DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217400 **DATE:** July 22, 1985

MATTER OF: Hugo Aucther GmbH

DIGEST:

1. Protest filed 6 months following award is untimely under GAO Bid Protest Procedures which require that a protest must be filed within 10 working days after the basis of protest is known or should have been known. Record does not show that the protester, who received one of several awards made and protested only when a portion of its contract was later terminated, diligently sought information to determine whether a basis of protest existed.

2. Protester is not an interested party who may complain of the reaward of portions of contracts originally awarded to other firms where those contracts were terminated so agency could correct a deficiency in its procurement and the vendors who initially received the awards would be in line for reinstatement if the protest were sustained.

3. Protest that proposal, which did not identify registered trade name of fibers for carpet, failed to comply with descriptive data requirement is denied because the apparent awardee complied with the RFP requirement, which only required identification of generic fiber. However, two subitems for which no fiber identification was given should not be awarded to the intended awardee.

4. Where protester has not supported its assertion that product offered does not conform to required wear classification, the protest is denied.

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Hugo Auchter GmbH protests the Air Force's intention to make award to Douglass Industries, Inc., under request for proposals (RFP) No. F61546-84-D-0183 issued for carpet and carpet tiles for Air Force and other government facilities in Europe. Auchter contends that Douglass' proposal did not meet the requirements of the RFP and should have been rejected, and that the Air Force held discussions with Douglass without allowing other offerors an opportunity to revise or modify their proposals.

The protest is denied in part, dismissed in part and sustained in part.

On January 25, 1984, the Air Force in Europe issued the RFP to solicit offers for one or more requirements-type contracts for carpeting and carpet tiles. The RFP contained 25 line items and required offerors to propose alternative expedited delivery on many of these items. Awards were to be made on the basis of price.

Seven firms submitted proposals. Douglass submitted the lowest price on 12 items. In June 1984, four requirements contracts for various items were awarded, with Auchter receiving a contract for 5 items. Douglass was found to be nonresponsible and received no award.

On July 27, Douglass filed suit in the United States District Court for the District of Columbia (Civil Action No. 84-2308) contending that it was a small business and that the contracting officer should have referred the question of its responsibility to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC).

Douglass' suit resulted in a Stipulation of Settlement and Dismissal which was signed by Douglass, representatives of the United States Attorney's Office and the court on September 21, 1984. The stipulation stated that the Air Force would refer its nonresponsibility determination to the SBA for review under the COC procedures and, in the event a COC was issued, would terminate and award to Douglass all items previously awarded on which Douglass was the low "responsive" offeror. The stipulation also

contained a list of items on which it was "understood" that Douglass was the low responsive offeror.

The Air Force referred its nonresponsibility determination to the SBA and, on December 7, SBA issued a COC to Douglass. On December 14, the Air Force issued partial termination for convenience notices to the four firms which had received awards in June, including items upon which Douglass had been the low bidder. The notice to Auchter terminated all but one of the contract items it had been awarded.

On December 17, Auchter protested to our Office contending that Douglass' offer failed to meet material requirements of RFP items 5, 6, 8, 9, 19 and 22 and related subitems. In a telex supplementing its protest on December 21, Auchter argued that Douglass' offer also was "not responsive" to the RFP on items 3, 4, 7, 10, 11, 13, 15, and 16. In subsequent submissions, Auchter has argued that Douglass' offer is not acceptable on a number of other items and that the other awards made in June 1984, to National Carpet Mills, Inc., Coronet Industries, Inc., and Midwest and Southern Industries, Inc., also were improper.

Threshold Issues

At the outset, we dismiss all of Auchter's protest except those portions of it that relate to items awarded to Auchter in June 1984.

In this regard, Auchter first protested that the awards to National Carpet, Coronet, and Midwest and Southern were improper on March 18, 1985, in its comments on the Air Force's administrative report. Our Bid Protest Procedures require that a protest must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(b)(2) (1984). While this rule does not require a protest to be filed within 10 working days after award if the basis of protest is not known, it is incumbent upon the potential protester in such circumstances to diligently seek information needed to determine whether a basis of protest exists. Policy Research Inc., B-200386, Mar. 5, 1981, 81-1 CPD ¶ 172. There is no indication in the record that Auchter made any attempt to ascertain the contents of proposals submitted by National

Carpet, Coronet, and Midwest and Southern until months after the awards were made. Auchter's protest of awards to those firms is, therefore, untimely. Moreover, because Auchter did not file a timely protest of the initial awards to these firms, Auchter is not an interested party to protest award to Douglass of those items that were initially awarded to these firms.

On the other hand, we reject the position of the Air Force and Douglass that we should not consider Auchter's protest at all. According to them, Auchter could have intervened in the litigation filed by Douglass and is either untimely or foreclosed from challenging the results of the litigation--that is, the terms of the stipulation.

While Douglass has claimed Auchter was aware of the litigation, the record contains no evidence of this and Douglass' counsel has admitted that he cannot show from his records that copies of the court documents were furnished to Auchter prior to that firm's filing of this protest. Further, the stipulation does not purport to contain and has not been treated by the Air Force as constituting a final determination by the court concerning the acceptability of Douglass' proposal. In this connection, the stipulation refers to the Air Force's agreement to make award to Douglass on those items on which it was "responsive," that is, acceptable, and expresses the "understanding" of the Air Force and Douglass that this encompassed certain specified items. As we interpret this language, it amounts merely to a recitation by the parties of the facts as they viewed them. There was no finding by the court that Douglass' proposal was acceptable with respect to any particular items. In fact, the Air Force has refused to make award to Douglass on one item because it found after the COC was issued that Douglass' proposal was unacceptable for that item.

We think that the part of Auchter's protest concerning the award to Douglass of those items previously awarded to Auchter is timely. Although Douglass' proposal was available to Auchter in July when Douglass filed its suit, Auchter had no reason to protest at that time because the Air Force had not yet taken any action contrary to Auchter's interests. Timeliness is measured from the time

the protester learns of an agency action or intended action which the protester knows or should have known is contrary to its interests. Alliance Properties, Inc., 61 Comp. Gen. 48 (1981), 81-2 CPD ¶ 357. The first such action was the partial termination of Auchter's contract on December 14, 1984. Auchter's protest was filed within 10 working days of that date.

Auchter's Protest

Auchter contends that Douglass' offer should have been rejected because it did not meet the RFP requirements. Specifically, Auchter says the RFP required that proposals identify a registered trademark for each type of fiber offered, but that Douglass, which offered "100% Olefin" and "100% Nylon," did not comply with this requirement because Nylon and Olefin are not registered trademarks. Auchter also argues that the contracting officer improperly held discussions with Douglass after the protest was filed in order to make Douglass' proposal acceptable by secretly identifying the trademarks of the carpet offered.

In addressing the merits of that portion of Auchter's protest that is properly before us, we consider first Auchter's argument that Douglass' proposal was unacceptable because Douglass did not adequately identify the brand name fibers used in its carpets. The RFP stated, in this respect, that carpet fibers "shall have a registered trademark assigned such as 'Nylon,' 'Antron,' etc." For each item, the schedule included a blank, as follows:

"Offering on: _____
(Reg. Trademark Fiber)"

According to Auchter, such requirements for so-called "branded" fibers protect a buyer against substitution of substandard materials. Auchter says Douglass attempted to circumvent this requirement by offering products that it identified in its proposal as "Nylon" or "Olefin" without providing sufficient information to obligate it to furnish quality material.

We agree with Auchter that Douglass only identified fiber types as "Nylon" or "Olefin" in its proposal. We

must reject, however, Auchter's contention that Douglass' proposal therefore was necessarily unacceptable. Although the solicitation stated that each carpet fiber was to have an assigned registered trademark, it illustrates what was meant in the same clause by making a specific reference to "Nylon, Antron, etc." If, as Auchter asserts, "Nylon" describes a generic fiber, it was on notice of an apparent ambiguity in the solicitation that it failed to protest prior to receipt of proposals. In our view, Auchter has no basis for complaint now that the Air Force, reading the two phrases together, has interpreted its requirement as being satisfied by a description that is consistent with the examples stated in the IFB. In this regard, Douglass merely followed the example give in the solicitation by referring to "Nylon" and "Olefin."

The protest, however, is sustained with respect to subitems 19AC and 19AD. In the blank space for offerors to indicate fiber types on item 19, Douglass inserted "See Individual Items." Item 19 included four subitems, 19AA, 19AB, 19AC and 19AD. Douglass identified fibers for subitems 19AA and 19AB, but did not identify fibers for subitems 19AC and 19AD. The solicitation clearly required offerors to furnish a description of the fiber offered on each item or subitem, and since the Air Force, while arguing that Auchter is incorrect in its assertion regarding the need to designate a registered trademark, has treated the generic designation as necessary in evaluating proposals, award to Douglass on subitems 19AC and 19AD would be improper. Everhart Appraisal Service, Inc., B-213369, May 1, 1984, 84-1 CPD ¶ 485 (holding that it is improper for an agency to depart in any material way from the evaluation plan described in the solicitation).

Since Douglass did identify a generic fiber type for all of the disputed items, except subitems 19AC and 19AD, the remainder of this portion of the protest is denied.

Auchter also contends that Douglass, which offered cut-pile Olefin carpet on subitem 19AA, did not conform to a requirement that carpet offered under that subitem meet a class III wear classification. According to Auchter, Air Force Manual 88-15, dated March 24, 1978 (AFM 88-15), contains required standards for evaluation of all carpet

proposals submitted to the Air Force. Auchter argues that the Air Force did not follow this document which Auchter interprets as indicating that Olefin in cut-pile form is not appropriate for class III applications.

We first point out that AFM 88-15 was not part of or referenced by the RFP. AFM 88-15 is intended merely to provide guidance for the acquisition, installation and maintenance of carpets. In these circumstances, the Air Force was not bound to follow AFM 88-15 in evaluating proposals, but, rather, was bound to apply section "C," paragraph 1699, of the RFP, which governs evaluation of wear classification. That section defines the three classes, or traffic levels, for evaluation of wear classification. Class I is defined as applying to carpet for "moderate commercial" applications, class II, to "heavy commercial" applications, and class III, to "extra heavy commercial" applications.

The Air Force indicates that it views Douglass' proposal to furnish cut-pile Olefin for item 19AA as acceptable because such carpet is commonly used in class III--that is, extra heavy commercial--applications. Since as indicated, the standards outlined in AFM 88-15 are not controlling and since Auchter has offered no evidence to support its assertion that Olefin cut-pile carpeting does not conform to industry usage in extra heavy commercial applications, we have no basis upon which to object to the agency's acceptance of this item as meeting class III standards. Rolm Southern California, B-216955, Mar. 14, 1985, 85-1 CPD ¶ 327.

We dispose of the remainder of Auchter's complaints with only brief comments. For example, Auchter argues that Douglass' offer of Olefin on subitem 19AA and Nylon on 19AB should not be viewed as acceptable; there was no requirement, however, that offerors propose a single fiber type on all subitems.

Concerning a contention by Auchter that Douglass inconsistently offered the same pattern of carpet in response to items 19 and 21, we point out that only the proposed award of 19, which was discussed above, is properly before us and that the Air Force does not intend

to award item 21 to Douglass because it agrees that Douglass' proposal was not acceptable on that item.

In regard to the adequacy of Douglass' listed place of performance, this is a matter of responsibility, and we do not review affirmative determinations of responsibility, absent circumstances that are not relevant here. Deterline Corp., B-208986, Apr. 21, 1983, 83-1 CPD ¶ 427.

Finally, since Douglass' proposal furnished the brand name data required, a further contention by Auchter tnat the Air Force improperly held discussions with Douglass allowing that firm to furnish additional brand name information (which the Air Force says was related solely to preparation of its defense of the protest) is academic and need not be consiaered. Martin Marietta Corp., B-204785, May 5, 1982, 82-1 CPD ¶ 423.

The protest is sustained with regard to subitems 19AC and 19AD. Those portions of the protest that do not relate to items awarded to Auchter in June of 1984 are dismissed. The remainder of the protest is denied. In accord with our decision, we recommend that the Air Force not award subitems 19AC and 19AD to Douglass.

for Shelton J. Fordan
Comptroller General
of the United States